

STATE OF MICHIGAN
SUPREME COURT

JAMES O. GORE AND BOBBIE N. GORE,

Plaintiffs-Appellees,

v

FLAGSTAR BANK, FSB,

Defendant-Appellant

SUPREME COURT

COURT OF APPEALS

#: 248919

LOWER COURT

#: 01-034913 CK

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APPLICATION FOR LEAVE TO APPEAL

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**STATEMENT IDENTIFYING JUDGMENT
APPEALED FROM AND STATING RELIEF SOUGHT**

The Defendant-Appellant, Flagstar Bank, by and through its attorney, requests that the Court grant its Application for Leave to Appeal from a decision of the Court of Appeals dated November 7, 2004, reverse the decision of the Court of Appeals and reinstate the Judgment Notwithstanding the Verdict entered by Oakland County Circuit Court Judge Michael Warren.

QUESTIONS PRESENTED FOR REVIEW
RELATED TO FACTS OF THE CASE

THE DECISIONS OF THE TRIAL COURT AND OF THE COURT OF APPEALS PRESENT THE FOLLOWING ISSUES:

I. DID THE COURT OF APPEALS ERR IN DETERMINING THAT THE JURY, AND NOT THE TRIAL JUDGE, SHOULD DETERMINE WHETHER APPELLEES' PROMISSORY ESTOPPEL CLAIM SHOULD GO FORWARD AND DID THE COURT'S DECISION CONFLICT WITH BINDING SUPREME COURT PRECEDENT.

APPELLANT STATES: Yes.

APPELLEE STATES: No.

LOWER COURT STATES: No.

II IS THE DECISION OF THE COURT OF APPEALS THAT APPELLEES' PROMISSORY ESTOPPEL CLAIM, WHICH WAS BASED ON AN ORAL PROMISE, DID NOT VIOLATE THE STATUTE OF FRAUDS CLEARLY ERRONEOUS AND IN CONFLICT WITH A BINDING DECISION OF THE COURT OF APPEALS?

APPELLANT STATES: Yes.

APPELLEE STATES: No.

LOWER COURT STATES: No.

III. DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR IN FAILING TO FOLLOW MICHIGAN PRECEDENT THAT A PROMISSORY ESTOPPEL CLAIM CANNOT BE BASED ON A CONDITIONAL PROMISE, ESPECIALLY WHEN THE CONDITION DID NOT TAKE PLACE?

APPELLANT STATES: Yes.

APPELLEE STATES: No.

LOWER COURT STATES: No.

IV. ARE THERE A NUMBER OF ADDITIONAL REASONS THAT THE COURT OF APPEALS ERRED IN REVERSING JUDGE WARREN'S DECISION TO GRANT THE JUDGMENT NOTWITHSTANDING THE VERDICT?

APPELLANT STATES: Yes.

APPELLEE STATES: No.

LOWER COURT DID NOT ANSWER THE QUESTION.

V. DO THE ISSUES IN THIS APPEAL INVOLVE LEGAL PRINCIPLES
OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE?

APPELLANT STATES: Yes.

APPELLEE STATES: No.

LOWER COURT DID NOT ANSWER THE QUESTION.

**STATEMENT OF MATERIAL
PROCEEDINGS AND FACTS**

Plaintiffs-Appellees, James and Bobbie Gore, filed this lender liability action against Flagstar Bank in the Oakland County Circuit Court on September 24, 2001.

In their Complaint the Gores claimed that the Bank's failure to fund a loan commitment 1) was a breach of contract, 2) violated the doctrine of promissory estoppel, 3) constituted fraud, and 4) violated the Michigan Consumer Protection Act. Pursuant to a Motion for a Directed Verdict, the Court dismissed the Michigan Consumer Protection Act claim.

The testimony revealed that the Plaintiffs were the owners of a bowling alley in Milford, Michigan and that NBD Bank held a first mortgage on the bowling center and also as additional collateral, a second mortgage on Plaintiffs' farm residence in Highland, Michigan.

Plaintiffs defaulted on their note to NBD and NBD foreclosed on the bowling center. NBD also then foreclosed on the second mortgage on the Plaintiffs' farm residence. (TR., Vol I, 108,109) NBD bid in \$175,000.00 at the Sheriff's sale on March 31, 1998. The redemption period was one year ending March 31, 1999.

The Gores approached a number of banks to attempt to finance the redemption of their property within the one-year period. (TR., Vol III, 30) Unfortunately, every bank that they approached was unwilling to make a loan because the Plaintiffs' loan with NBD had gone through a foreclosure sale and was now in the redemption period.

In February, 1999, the Gores approached Paul O'Connell, a loan officer at Flagstar Bank in Brighton, Michigan seeking a loan. (TR, 1/27/03, 35)

The testimony revealed that the parties agreed to a commitment letter (see attached **Exhibit 1**, trial exhibit 24/35). The loan amount on the commitment letter was \$182,000.00.

Flagstar Bank continued to attempt to help the Gores obtain their loan and NBD agreed to extend the redemption period by two months. However, the testimony at the trial revealed that the Gores were unable to meet the conditions of the commitment letter. (TR., 1/27/08, 61, 62)

Condition No. 9 on Exhibit 24 read as follows:

“Subject to additional conds; loan may not be approvable.”

The above language makes it impossible for the Gores to have relied on the commitment letter since it states in black and white that the loan may not be approvable.

Conditions 5 and 6 read as follows:

“(5) DOC. MTG CURRENT AT TIME OF APPLICATION; IF NOT, MUST REDUCE PORT LEVEL TO PORT 4, LTV MAY
(6). . . BE LOWERED & CANNOT HAVE CASH OUT. (& CANNOT BE MORE THAN 89 DAYS PAST DUE)”

All of the testimony at the trial was that conditions 5 and 6 were not met. (TR., Vol III, 35, 36) The testimony was that the First National Bank of Howell Mortgage was not current at the time of application, but in fact was approximately three months delinquent. More importantly, the NBD mortgage was not current at the time of application and was also more than 89 days past due. The NBD mortgage had gone into foreclosure and was 10 months into the redemption period at the time that the loan was applied for. Therefore, the debt was obviously more than 89 days past due.

Paul O’Connell testified that conditions 5 and 6 were not met. (TR., Vol III, 139) Tina Cowen, a Flagstar employee working in the underwriting department, testified that conditions 5 and 6 were not met. (TR., Vol III, 35, 36) More importantly, Plaintiff, James Gore, testified on cross-examination that conditions 5 and 6 were not met.

Another condition that was not met was that the NBD loan was in foreclosure. One of Flagstar's conditions was that it could not make a loan once the underlying mortgage was foreclosed upon and entered the redemption period.

Condition no. 4 reads as follows:

"Satisfactory appraisal by a Flagstar approved appraiser for at least \$275,000.00"

Tina Cowen testified that in order for the appraisal to be satisfactory, the property proposed as collateral had to meet Flagstar guidelines. (TR., Vol III, 135, 139)

In this case, the collateral did not qualify under Flagstar's guidelines for two reasons as follows:

1. The collateral was a working farm; and,
2. The property was larger than ten acres and Flagstar could not make a loan on property larger than ten acres.

Tina Cowen and Paul O'Connell testified that condition 4 was not met because the property was a working farm and was greater than 10 acres. (TR., Vol III, 133, 134) Also, James Gore testified on cross-examination that requirement no. 4 was not met because his property was a working farm and consisted of more than 10 acres. (TR., Vol III, 40)

Mr. Gore also testified that he understood that under condition no 9 the bank could have additional conditions that would be binding upon him. (TR., Vol III, 37)

When it became obvious that the Plaintiffs were unable to meet the conditions for the loan, Mr. O'Connell contacted the Plaintiffs and notified them that the loan could not be made. (TR., 1/27/03, 73)

Mr. O'Connell continued to try and help the Plaintiffs by referring them to Fairway Mortgage Corporation and Craven Financial. (TR., 1/27/03, 73) However, these institutions,

like all of the other institutions approached by the Plaintiffs, were unable to make the loan primarily because the loan had gone through foreclosure and was in the redemption period.

Since none of the voluminous number of financial institutions that the Gores had contacted was able to make a loan to them, the redemption period expired and NBD took the farm.

The Circuit Judge instructed the jury on both the breach of contract and promissory estoppel theories giving separate instructions on each of those counts. Counsel for the Appellee objected to the giving of the promissory estoppel instruction stating there where contractual promises were involved, there could be no instruction on promissory estoppel. At this point in the proceeding the Court did not agree with counsel for the Bank and instructed the jury on both the breach of contract and promissory estoppel theories.

Pursuant to a special verdict form, the jury concluded that Flagstar had not breached a written contract. (See attached **Exhibit 2**) However, the jury concluded that the Gores had proved a promissory estoppel claim and awarded damages to them in amount of \$206,856.00. The Circuit Court entered Judgment on the verdict on February 11, 2003.

Flagstar Bank then filed Motions for Judgment Notwithstanding the Verdict and for New Trial on March 4, 2003. The Court entered an Opinion and Order (See attached **Exhibit 3**) on May 15, 2003 granting the Motion for Judgment Notwithstanding the Verdict.

In its Opinion, the Circuit Court Judge stated that it was error to instruct the jury on the promissory estoppel claim where there were contractual promises made. The Court reviewed the comments to the Standard Jury Instructions and also the substantial body of case law indicating that a promissory estoppel instruction should not be given where the evidence shows that a contract had been entered into.

A second basis for the Court's grant of the Judgment Notwithstanding the Verdict was that the Plaintiffs had used oral promises that the conditions in the contract had either been met or waived in order to prove their promissory estoppel claim. Without these oral statements there is no way that the jury could have found for the Plaintiffs on the issue of promissory estoppel. The Court concluded that these oral statements were barred under the Statute of Frauds and therefore, the promissory estoppel instruction should not have been given.

Since the only theory on which the Plaintiffs had prevailed at trial was the promissory estoppel theory, the Court entered Judgment for Defendant, Flagstar Bank. Plaintiffs filed their Claim of Appeal on June 3, 2003. Defendant filed its claim of Cross-Appeal on June 23, 2003.

On November 9, 2004 the Court of Appeals issued an Opinion reversing Judge Warren's grant of a Judgment Notwithstanding the Verdict. The Court of Appeals determined that it was the jury, and not the trial judge, which was to determine whether a promissory estoppel claim should go forward.

The Court of Appeals also determined that an oral promise made by a Flagstar employee, Paul O'Connell, to the Gores, that they would qualify for financing, did not violate the Statute of Frauds, MCL §566.132(2).

Flagstar has filed this application for leave to appeal alleging that the Court of Appeals made errors which have had an adverse impact on the jurisprudence of the State of Michigan.

First of all, the law of the State of Michigan states that the Court, and not the jury, shall determine whether a promissory estoppel claim should go forward.

In addition, the Court must determine whether a written contract governs the dispute, and if it does, then the jury should not be instructed on promissory estoppel.

In addition, the Statute of Frauds, MCL§ 566.132(2) clearly provides that a statement to make a loan must be in writing in order to be enforceable. Therefore, the Court of Appeals decision that the oral promise to make a loan was enforceable was erroneous.

The Court of Appeals decision has created confusion and splits of authority in the areas of contract law, promissory estoppel and the Statute of Frauds. This Court could clear up the confusion in these areas of the law by granting leave to appeal and reversing the decision of the Court of Appeals.

I. THE COURT OF APPEALS MADE A SIGNIFICANT ERROR IN DETERMINING THAT THE JURY, AND NOT THE TRIAL JUDGE, SHOULD DETERMINE WHETHER THE APPELLEE'S PROMISSORY ESTOPPEL CLAIM SHOULD GO FORWARD AND THE COURT'S DECISION CONFLICTED WITH BINDING SUPREME COURT PRECEDENT.

MCR 7.302 (B)(5) provides that in an appeal from a decision of the Court of Appeals, an application for leave to appeal must show that:

“ . . . the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or. . . ”

As will be demonstrated below, the Court of Appeals decision is clearly erroneous and will cause material injustice to Flagstar Bank. In addition, the Court's decision conflicts with binding authority of the Michigan Supreme Court and the Michigan Court of Appeals.

Throughout the trial the Plaintiffs claimed that they had entered into an enforceable binding contract. The Defendant, Flagstar Bank, agreed that the parties had entered into a conditional contract, but argued that the conditions of the contract were not met by the Plaintiffs.

When it came time to instruct the jury, Defendant's counsel pointed out that it would be improper to give an instruction on promissory estoppel since the Plaintiffs were proceeding on a breach of contract claim.

Over Defendant's objection, the Court gave an instruction on promissory estoppel. However, when the Defendant filed a Motion for Judgment Notwithstanding the Verdict based on the improper promissory estoppel instruction, the Court granted the Motion realizing that the promissory estoppel instruction should not have been given.

In his Opinion (see attached **Exhibit 3**), Judge Warren ruled as a matter of law that a written contract governed the transaction and therefore the jury should not have been instructed on promissory estoppel.

The Defendant's objection was based on a comment to M Civ. JI 130.01, pg. 130-7, dealing with the standard jury instructions for promissory estoppel, which read as follows:

"Promissory estoppel is not available as a cause of action for a person who suffers an injury relying on an enforceable contract promise because the usual remedies for breach of contract apply. Promissory estoppel substitutes for consideration in a case where there are no mutual promises. *Huhtala*. Where the reliance claimed by the promisee is bargained-for and is performance required under a contract between the parties, the promisee must rely on contract remedies and cannot sue on a promissory estoppel theory. See *General Aviation v. Cessna Aircraft Co*, 703 F Supp 637 (WD Mich 1988), *aff'd in part, rev'd in part on other grounds*, 13 f3d 178 (ca 6, 1993); *Paradata Computer Networks v. Telebit Corp*, 830 F Supp 1001 (ED Mich 1993). **Whether reliance is also performance under a contract is usually resolved by the court as a matter of law.**" (Emphasis added)

Under the above comment to the standard jury instructions, it is clear that the Judge, and not the jury, decides whether there is a contract governing the issue and if there is such a contract, no instruction should be given on promissory estoppel.

By granting Flagstar's Motion for Judgment Notwithstanding the Verdict, the Court followed the comment to the standard jury instruction by ruling that there was a contract governing the issue as a matter law and therefore, the jury should not have been instructed on promissory estoppel.

Another section of the comment to the standard jury instructions M Civ. JI 130.01, pg. 130-6, reads as follows:

"Applicability of the doctrine of promissory estoppel is a mixed question of law and fact, **and the trial court needs to determine as a matter of law whether it is proper to invoke the doctrine of promissory estoppel** by making a threshold inquiry into the circumstances surrounding the making of the promise and the promisee's reliance. *Standish*, 442 Mich at 84. *Standish* suggests that this threshold inquiry involves a determination that the doctrine must be invoked to avoid injustice. See *RS Bennett & Co v Economy Mechanical Industries, Inc.*, 606 F2d 182 (CA 7, 1979), cited in *Standish*, 442 Mich at 85 n6. Certainly the avoidance of injustice requirement of promissory estoppel is equitable in nature and presents a **policy decision for the court, not a question of fact for the jury.** . ." (Emphasis added)

Under the above comment, it is clear that it is the Judge, and not the jury, who determines whether the doctrine of promissory estoppel should be invoked. Judge Warren followed this comment in granting the Judgment Notwithstanding the Verdict because he determined that since there was a binding contract governing the issue, the doctrine of promissory estoppel should not be invoked.

The Court of Appeals in its Opinion argues that the issue of promissory estoppel should have been left to the jury. Under the above authority it is clear that the Court of Appeals' position is incorrect since the Court is to determine whether a promissory estoppel instruction is to be given as a matter of law.

Under the above authority, it is clear that where there is an express contract involving bargained-for promises, the promisee, such as the Appellees in the present case, must rely on contract remedies and cannot sue on a promissory estoppel theory.

The test as set forth in the comment above and in the case law cited below is that where the reliance claimed by the promisee is bargained-for and is performance required under a contract between the parties, the promisee must rely on contract remedies and cannot sue on a promissory estoppel theory.

In this case, the reliance claimed by the Plaintiffs was that they relied on the Flagstar Bank's conditional promise to loan the money and therefore, did not seek out alternative financing from another bank.

In addition, the performance required under the contract was that the Plaintiffs would borrow their money from the Defendant, Flagstar Bank, if they met the conditions for the loan, and that they would not seek out alternative financing from another bank. Therefore, the reliance claimed by the promisee and the performance required under the contract were the same: the

Appellants would not seek out financing from another bank. Therefore, under the authority cited above and discussed below, the Plaintiffs must rely on contract remedies and cannot sue on a promissory estoppel theory.

In Corbin on Contracts, Formation of Contracts, § 8.12 p. 133, the commentator states:

“ . . . Because promissory estoppel in Michigan is a substitute for consideration, when the same performance satisfies both detrimental reliance for promissory estoppel and consideration for a written contract, promissory estoppel is not applicable. . . ”

Here, Judge Warren found that the transaction was governed by a written contract and that there was consideration for the contract. He then found that the same performance satisfied both detrimental reliance for promissory estoppel and consideration for the written contract. Therefore, Judge Warren correctly ruled that promissory estoppel was not applicable and the jury should not have been instructed on that doctrine.

In its Opinion, the Court of Appeals makes a number of arguments regarding the jury verdict on promissory estoppel. However, the point is that the issue of promissory estoppel should never have been submitted to the jury. It does not matter what the jury found on the issue of promissory estoppel since it was error to submit the issue to them in the first place. Whether the jury's verdict was consistent or inconsistent is irrelevant under these circumstances.

Judge Warren, in his Opinion, did not rely on the jury verdict to determine that there was a valid contract in this case. Rather, Judge Warren decided the issue as a matter of law in reviewing the testimony of the witnesses.

In his Opinion granting Judgment Notwithstanding the Verdict, (See **Exhibit 3**), Judge Warren made the following statements:

“Because allowing the jury to consider the doctrine of promissory estoppel was error, the Defendant's motion for relief should be granted. . . ” (p. 15)

“7. . . . the case at bar unequivocally has a written agreement, the performance of which also constitutes the claims of promissory estoppel. . . (Emphasis added) (Footnote 7, p. 13)

8. . . Moreover, the Legislature’s policy decision to preserve the integrity of written contracts and agreements in the financial services industry appears to be well-grounded – the case in bar is just one example of how financial institutions may be subjected to extensive litigation even when the terms of the agreement at issue clearly eschew any liability on the part of the institution.” (Footnote 8, p. 15)”

From the above statements, it is clear that Judge Warren found that there was a binding contract as a matter of law, the performance of which also constituted the claims of promissory estoppel. Based on his ruling, the Judge granted the Motion for Judgment Notwithstanding the verdict, ruling as a matter of law that there was a contract and accordingly the jury should not have been instructed on the issue of promissory estoppel. He stated:

“As noted, *supra*, promissory estoppel “substitutes for consideration in a case where there are no mutual promises” – in the instant case **there were mutual promises** contained in the March 24 Commitment Letter, which promises satisfy the Statute of Frauds, but which were rejected as a cause of action by the jury. . . ” (P. 13) (Emphasis added)

In *State Bank of Standish v. Curry*, 442 Mich 76, 84 (1993), the Michigan Supreme Court stated:

“In Williston on Contracts, Professor Lord observes that although the elements required to invoke the doctrine are straightforward, they necessarily involve a threshold inquiry into the circumstances surrounding both the **making of the promise and the promisee’s reliance as a question of law. . .** ” (Emphasis added)

Under the above authority the Michigan Supreme Court clearly states that it is a trial court’s duty to determine as a matter of law whether an instruction on promissory estoppel is appropriate. That is exactly what Judge Warren did in this case when he granted Flagstar’s Motion for Judgment Notwithstanding the Verdict. He determined as a matter of law that an instruction on promissory estoppel was inappropriate.

The position of the Court of Appeals that the matter should not have been decided by the Court as a question of law, but rather by the jury as a question of fact, is erroneous under the authority of *State Bank of Standish v. Curry, supra*.

Under the above analysis it is clear that the requirements of MCR 7.302 (B)(5) have been met in this case. The decision of the Court of Appeals to leave the promissory estoppel issue to the jury was clearly erroneous. In addition, the Court of Appeals decision conflicted with the Supreme Court Decision of *State Bank of Standish v. Curry, supra*.

Further, Flagstar Bank has suffered a material injustice as a result of the ruling of the Court of Appeals. Flagstar had a number of conditions contained in its contract which were not met by the Plaintiffs. Yet a verdict was entered against Flagstar under the promissory estoppel doctrine with the Court of Appeals stating that the promissory estoppel claim was unconditional.

Therefore, Flagstar was deprived of the right to contractually set conditions for the making of a loan. It was also deprived of the right to have a Judge determine whether there was a valid contract in the case, along with the right to have a Judge determine whether there was a valid promissory estoppel claim in this case.

Further, under Michigan law the Court not only decides whether a promissory estoppel instruction is appropriate as a matter of law, it also determines whether there is a contract between the parties as a matter of law.

In Trentacosta, Michigan Contract Law, §5.1, p 5-3, the commentator states:

“Issues of contract interpretation can be critical to the outcome of a contract dispute. Interpretation of an unambiguous, fully integrated contract is a question of law to be determined by a judge, not a jury . . .”

In *G&A Inc. v. Nahra*, 204 Mich App 329 (1994), the Court of Appeals stated:

“If a contract’s language is clear, its construction is a question of law for the court. *Hafner v. DAILE*, 176 Mich App 151, 156; 438 NW2d 891 (1989). When

presented with a dispute, a court must determine what the parties' agreement is and enforce it. *Whitaker v. Citizens Ins Co*, 190 Mich App 436, 439; 476 NW2d 161 (1991). . .”

Under the above authority it is clear that Judge Warren had two decisions to make as a matter of law. The first decision was to determine whether there was a contract governing the dispute. He determined that there was. The second issue was whether the jury should be instructed on promissory estoppel, in light of the fact that there was a binding contract covering the dispute. Judge Warren determined that the jury should not have been instructed as to promissory estoppel and he was correct in his decision under the above authority.

The Michigan Nonstandard Jury Instructions contain an instruction on promissory estoppel in § 36:06, which reads as follows:

“To support a promissory estoppel claim, the alleged reliance on the promise must be based solely and exclusively on the alleged promise. **The acts of reliance cannot be performance which is otherwise required by an existing contract or by law.**” (Emphasis added)

Under the Michigan Nonstandard Jury Instructions it is clear that where there is an existing contract, a promissory estoppel instruction should not be given where the acts of reliance are performance which is otherwise required by a contract. Here, the performance under the contract was the same performance which was relied on under the promissory estoppel claim. Therefore, under the Michigan Nonstandard Jury Instructions, Judge Warren was correct in ruling that an instruction on promissory estoppel should not have been given to the jury.

In Kehoe, Jury Instructions for Contract, Promissory Estoppel, §4.05, p. 259, the commentator stated:

“ . . . On the other hand, promissory estoppel is not available to give the plaintiff a “second bite at the apple” if the plaintiff does not have the benefit of a valid contract, even if by reason of the defense of waiver or other such principle the plaintiff is unable to recover for breach of the contract. *Wagner Excello Foods, Inc. v. Fearn Int’l, Inc.*, 235 Ill. App. 3d 224, 235-37, 601 N.E.2d 956, 964-65 (1st

Dist. 1992); *LaSalle Nat'l Bank v. Metropolitan Life Ins. Co.*, 18 F.3d 1371, 1376 (7th Cir. 1994).”

In this case there was a valid contract which was not breached, and the Plaintiffs were given a “second bite of the apple” under the promissory estoppel claim. To allow the Plaintiffs to circumvent the terms of the valid contract was error under the above authority.

In *Martin v. East Lansing School District*, 193 Mich App 166, 180 (1992), the Court of Appeals stated:

“... The court correctly rejected promissory estoppel on the first of the dual grounds recited above. Even if promissory estoppel was not barred by the subsequently written contracts, the implied promises were not in writing. As argued in defendant district’s brief, contracts between teachers and boards of education must be in writing and signed by the proper entity. MCL 380.1231; MSA 15.41231. To allow verbal representations by staff administrators to bind the district without a written contract or action by the board itself would be to ignore the statute.”

Here, as in *Martin, supra*, the promissory estoppel claim was properly dismissed by the trial court.

In *General Aviation v. Cessna*, 915 F.2d 1038 (6th Cir. 1990), the 6th Circuit applied Michigan law and stated:

“General Aviation’s theory is that Cessna’s oral promises to treat it fairly and equally with other dealers caused it to rely to its detriment on those promises. Relying on *Walker v. KFC Corp.*, 728 F.2d 1215 (9th Cir. 1984), the District Court found that “where . . . the performance which is said to satisfy the detrimental reliance requirement of the promissory estoppel theory is the same performance which represents consideration for the written contract, the doctrine of promissory estoppel is not applicable.” *General Aviation*, 703 F.Supp. at 647 n. 10.

In other words, General Aviation agreed to forego its future dealings with Beech Aircraft in order to enter into a written contract which, by its own terms, was a full and complete expression of the parties’ intentions. General Aviation knew exactly what it was getting into because each and every term was spelled out in black and white in the contract. **“Promissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract.”** *Walker*, 728 F.2d at 1220.” (Emphasis added)

In the present case, the parties conceded that there was a conditional contract. However, on the Verdict Form (see **Exhibit 2**) the jury found that there was no breach of the contract and the Plaintiffs were given a second bite of the apple by way of the promissory estoppel doctrine. Judge Warren realized that this was improper and correctly granted the Defendant's Motion for Judgment Notwithstanding the Verdict.

Also, in *Paradata Computer Networks v. Telebit Corp.*, 830 F. Supp 1001 (E.D. Mich 1993), the Court construed Michigan law and stated:

"The performance of the contract by ParaData was also the detrimental reliance it claims under this theory of liability. In exchange for the agreement with Telebit, ParaData gave up its opportunity with U.S. Robotics. ParaData cannot rely on promissory estoppel when it has a fully integrated contract for which it can seek redress. Any promises made by Telebit should have been made a part of the contract if ParaData hoped to rely on them. Thus, promissory estoppel is inapplicable to this case and summary judgment should be granted to Telebit on this count."

In this case, Plaintiffs brought a written contract into the Court and claimed that it was signed and binding. Under these circumstances where the alleged promises are contractual, the Plaintiffs cannot have a jury instruction on the promissory estoppel doctrine. Accordingly, the Court properly set the jury verdict aside pursuant to the Motion for Judgment Notwithstanding the Verdict. (Please see **Exhibit 3**)

In *Walker v. KFC Corporation*, 728 F.2d 1215 (9th Cir. 1982), the Court stated:

". . . Upon exercise of the option, the franchisee was required by the terms of the franchise agreement to use its best efforts to promote and develop the business of the restaurant and to market the Zantigo products approved by KFC. Thus, in entering into leases and spending valuable time as well as money in establishing and developing Zantigo restaurants in San Diego – the very acts which support the detrimental reliance element of plaintiffs' promissory estoppel claim – plaintiffs were providing the consideration that induced KFC to enter into the written agreements."

In *Walker supra*, the Court summarized by stating:

“In sum, either KFC was in breach of contract or it was not. The jury decided it was not. That should be the end of the matter. Promissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove a breach of contract.

We hold that the district court erred in denying KFC’s motion for judgment n.o.v. on the promissory estoppel issue.” (Emphasis added)

Under the above authority it is clear that promissory estoppel only comes into play when promises are made without consideration. In the present case, both Plaintiffs’ and Defendant’s promises were supported by consideration.

For example, Plaintiffs agreed that if it met the conditions of the loan documents, that it would borrow money from Flagstar Bank and not from any other financial institution. This was a bargained for promise since Flagstar agreed to loan money to the Plaintiffs, if they met all of the relevant requirements. Since there is consideration in the transaction before the Court, there is no need to apply the promissory estoppel doctrine.

In *APJ Associates, Inc. v. North American Philips Corp.*, 317 F.3d 610 (6th Cir. 2003), the Court of Appeals reviewed Michigan law and stated:

“ . . . Unjust enrichment, like promissory estoppel, is not applicable when the parties are bound by an express written agreement.”

Here, as in *APJ Associates, Inc., supra*, the parties are bound by an express written agreement, which is the commitment letter. (See **Exhibit 1**) Under *APJ Associates, Inc.*, since there is an express written agreement, the doctrine of promissory estoppel is not applicable.

In *Advanced Plastics Corporation v. White Consolidated Industries, Inc.*, 828 F.Supp. 484 (E.D. Mich) (1993), the Court construed Michigan law and stated:

“ . . . This is because promissory estoppel is an alternative theory of recovery where no contract exists; and, thus, it is a substitute for consideration. See *Huhtala v. Travelers Insurance Co.* 401 Mich. 118, 133, 257 N.W.2d 640 (1977) (“Promissory estoppel . . . substitutes for consideration in a case where there are

no mutual promises.”); State Bank of Standish v. Curry, 190 Mich.App. 616, 620, 476, N.W.2d 635 (1991), *affirmed in part and reversed in part*, 442 Mich.76, 500 N.W.2d 104 (1993).”

In the present case, as in *Advanced Plastics Corporation, supra*, the parties agreed that a conditional contract existed, but disagreed as to whether the conditions were met. Therefore, under *Advanced Plastics Corporation, supra*, promissory estoppel would have no application.

As pointed out in *Advanced Plastics Corporation, supra*, promissory estoppel is an alternative theory of recovery where no contract exists. In the case before the Court, a contract did exist.

Promissory estoppel provides a substitute for consideration where no consideration exists. In the present case, there is consideration since the Plaintiffs agreed that they would not seek financing elsewhere and would borrow money from Flagstar Bank if the conditions for making the loan were met. Since consideration exists, no substitute for consideration in the form of a promissory estoppel theory is necessary.

Further, in the unpublished decision of *Advanced Plastics Corporation v. White Consolidated Industries*, 47 F.3d 1167, (1995), the Court of Appeals stated:

“The district court properly dispensed with the promissory estoppel claim because the parties did not dispute the existence of a contract. Advanced Plastics alleges that White Consolidated strategically conceded the existence of a contract to foreclose Advanced Plastics’ promissory estoppel claim. A review of the record demonstrates that White Consolidated genuinely agreed that a contract existed. Advanced Plastics asserts that, to the extent the district court held that the parties engaged in a series of individual buy-sell transactions or that the contract was illusory for lack of mutuality, the court should employ promissory estoppel to determine the actual contract and obligations. Aside from Advanced Plastics’ lack of authority for this proposition, its most obvious defect is that the district court never advanced this holding but explicitly found that a single, valid contract existed. It is not necessary to construct an “actual contract.”

It is important to note that Defendant, Flagstar Bank, has never argued that there was no consideration in this case. Throughout the case Flagstar consistently argued that there was a

conditional contract entered into between the parties, which consisted of the commitment letter attached as **Exhibit 1**.

Plaintiffs have agreed that there was a contract. The fact that a contract is conditional does not mean that it is not a contract.

In *Berkel & Co. v. Christman Co.*, 210 Mich App 416; 533 NW2d 838 (1995), the Court of Appeals held that a conditional contract is still a valid and binding contract.

Another Michigan case that recognizes conditional contracts as valid binding contracts is *Lee v. Auto-Owners, Inc.*, 201 Mich App 39; 505 NW2d 866 (1993).

Throughout the trial, both parties agreed that there was a valid binding conditional contract in effect between the two parties. Throughout the trial both parties referred to the conditional contract. The jury was instructed on the elements of a breach of contract and both Plaintiff and Defendant submitted proposed jury instructions on breach of contract. Clearly the issue before the Court was whether the conditional contract had been breached.

The most important factor is that Judge Warren determined as a matter of law that there was a contract governing the issue.

In the opening statement of counsel for the Plaintiffs, he indicated that there were four claims in this case, including a claim for breach of contract.

In counsel for the Defendant's opening statement, he indicated that the case was based on breach of a conditional contract stating:

"In this case I guess what's it about from our standpoint is **do we have a right to contract**, do we have a right to set requirements for making a loan, or do we have to lend to everybody no matter how bad of a risk they are?" (Emphasis added)

In arguing the Defendant's Motion for Directed Verdict, Defendant's counsel clearly stated:

“ . . . If you are proceeding on a breach of contract claim, then you proceed on the breach of contract but if it’s a contractual promise, as this is, then the claim of promissory estoppel would not go to the jury and the same is true for fraud.”

Counsel for the Defendant consistently argued that there was a conditional contract in this case and that promissory estoppel was therefore not applicable.

Further, counsel for the Defendant, Flagstar Bank, stated as follows with regard to the jury instructions:

“ . . . Just to summarize briefly in terms of some of these instructions one of the objections that I had was to the giving of fraud and promissory estoppel instructions in this case which is based on a contract.”

In counsel for Plaintiffs’ closing argument, he made it clear that this was a breach of contract case, stating:

“The first is was this, is their claim, are any of their claims, they’re claims by the way and I’ll talk to you about them one by one. There’s breach of contract. **We had a contract and they broke it. . .**” (Emphasis added)

Counsel for the Plaintiffs also stated:

“And the next test is did Plaintiffs prove that the bank breached a contract. This thing is the contract and did the Gores prove that the bank breached it? So what the heck is that? What in the world is a breach of contract? Well the contract would be that there was a contract between the two parties, that they agreed to something and that these conditions in the contract were met as I went through them with you with regard to what Ms. Cowan said in her own documents and that the bank didn’t do it’s side. In other words the contract was there, the conditions were met by the Gores or fulfilled and the bank didn’t follow through and loan the money and then that the Gores were harmed and I’ll talk about the harm all at the same time in a couple of minutes. That would be the first claim. So you can decide that the Gores either proved that, and the Judge will give a specific instruction on what the elements are of breach of contract. You will have to decide if the Gores proved those elements of a breach of contract.”

Counsel for the Defendant also stated in his closing argument that this was a breach of contract case as follows:

“And then, you know, you’ll have the rest of these questions and as I mentioned in terms of a breach of contract the conditions here just simply are not met.”

As pointed out above, the Court gave the jury breach of contract instructions.

Judge Warren cited the case of *Fountain v. Chippewa County Road Commission*, 2002 WL 31947933 (Mich.App.2002) (See attached **Exhibit 5**) an unpublished Opinion, in support of his decision to grant Judgment Notwithstanding the Verdict. In *Fountain, supra*, the Court stated:

“ . . . Because there was a written contract, there can be no implied contract, and thus no recovery for unjust enrichment or promissory estoppel. See *Martin v. East Lansing School District*, 193 Mich.App 166, 177-180; 483 NW2d 656 (1192). Thus, we have addressed the alleged oral statements or negotiations that allegedly resulted in health benefits to retirees with only twenty-five years of service.”

In the present case, as in *Fountain, supra*, there is a written contract and accordingly there can be no recovery for promissory estoppel.

In *Cattin v. General Motors Corporation*, 955 F.2d 416 (6th Cir. 1992), the Court of Appeals stated:

“ . . . The same performance, however, cannot serve to satisfy both the detrimental reliance requirement of promissory estoppel and the consideration for the written contract. *General Aviation, Inc., v. Cessna Aircraft Co.*, 915 F.2d 1038 (6th Cir. 1990) (reh’g denied). Here, plaintiffs’ transfer to EDS constituted acceptance of the unilateral contract as well as both the consideration for the contract and the detrimental reliance. . . .”

As pointed out above, the Plaintiffs’ performance of the contract consisted of taking out a loan with Flagstar Bank and not going to other banks, provided that the Plaintiffs met the conditions for the loan. The detrimental reliance requirement of promissory estoppel was that the Plaintiffs would take out their loan with Flagstar Bank and would not go to other banks. Since the detrimental reliance requirement of promissory estoppel was the same as the consideration for the written contract, the Plaintiffs are left with their contract remedies and cannot have a claim for promissory estoppel under the above authority.

In *Willis v. New World Van Lines, Inc.*, 123 F. Supp. 2d 380 (E.D. Mich 2000), the Court stated:

“ . . . The doctrine of promissory estoppel is to be cautiously applied. Marrero, 200 Mich. App. at 443, 505 N.W.2d 275. If the performance satisfying the detrimental reliance requirement is the same performance which constitutes the consideration of a written commercial contract, the doctrine of promissory estoppel is not applicable. See General Aviation, Inc. v. Cessna Aircraft Co., 915 F.2d 1038, 1042 (6th Cir.1990).”

Judge Warren summarized this area of the law very well in his Opinion when he stated the following:

“As noted *supra*, promissory estoppel “substitutes for consideration in a case where there are no mutual promises” – in the instant case there were mutual promises contained in the March 24 Commitment Letter, which promises satisfy the Statute of Frauds, but which were rejected as a cause of action by the jury. In fact, as explained *infra*, to sustain the claim for any purpose whatsoever, the Plaintiffs were required to prove that a written agreement, signed by the Defendant, existed. The jury in the instant case found that such an agreement existed, and also found that the Defendant failed to breach that agreement. To permit the jury to then impose liability upon the Defendant without a breach of contract completely eviscerates the protections afforded in written contracts.” (Please see **Exhibit 3**)

The Plaintiffs have cited the case of *H.J. Tucker & Associates v. Allied Chucker & Engineering Co.*, 234 Mich App 550; 595 NW2d 176 (1999) and suggested that it supports the Plaintiffs’ position that Judgment Notwithstanding the Verdict should not have been granted.

However, *Tucker, supra*, is not a promissory estoppel case. *Tucker* deals with the concept of an implied contract which is a separate cause of action from promissory estoppel. In *Ho v. General Motors Corporation*, 661 F.Supp.618 (E.D. Mich 1987), the Court stated:

“Plaintiff’s counsel argues that an implied-in-fact contract exists on the basis of the promissory estoppel doctrine. An implied-in-fact contract and promissory estoppel, however, are separate and not interdependent doctrines. Regardless of whether the Court found the concept of estoppel relevant in this case, the allegation of an implied-in-fact contract would require separate analysis.”

In addition to the fact that *Tucker, supra*, does not deal with promissory estoppel, it is also distinguishable on its facts. In *Tucker* the parties did not agree that there was a contract in effect. However, in the case before the Court, both the Plaintiffs and the Defendant have agreed that there was a conditional contract in effect and that the issue before the Court was whether the conditions were met.

The most important distinguishing factor in *Tucker, supra*, is that in *Tucker*, the Court determined that there was a question as to whether there was a valid contract which governed the issue in the case. In the case at bar, Judge Warren correctly determined that there was a contract which governed the issue and accordingly it would be improper to instruct the jury on the issue of promissory estoppel.

It is clear that if there is an express contract in effect between the parties there can be no recovery for implied contract. *In re: DeHaan Estate*, 169 Mich 146; 134 NW 983 (1912), *Scholz v. Montgomery Ward*, 437 Mich 83; 468 NW2d 845 (1991), *VanFleet v. VanFleet*, 50 Mich 1; 14 NW 671 (1883).

The Court of Appeals' suggestion that the Court should have allowed the jury to decide both the breach of contract issue and the promissory estoppel issue is flawed for two reasons. First of all, in the case cited by the Court of Appeals, there was a dispute as to whether a contract existed. In the case at bar there was no dispute that a conditional contract existed. The issue is whether the conditions contained in the contract were met.

Secondly, the cases cited by the Plaintiffs, such as *Tucker, supra*, involved implied contract claims and not promissory estoppel claims. All of the authority cited above, dealing with promissory estoppel, uniformly states where there is an express contract between the

parties, the promissory estoppel issue should be dismissed and should not be submitted to the jury.

The Plaintiffs also erroneously argue that the Defendant argued that no enforceable contract was ever formed because of the lack of fulfillment of certain conditions. The Defendant did argue that certain conditions were not fulfilled, but never argued that there was no enforceable contract ever formed. As pointed out above, the contract which was formed was a conditional contract, which under Michigan law is a valid and binding contract. The fact that the conditions were not fulfilled does not mean that a contract was never formed; it simply means that the Plaintiffs were unable to fulfill the conditions for enforcement of the contract.

As pointed out above, promissory estoppel acts as a substitute for consideration. Since no one ever claimed that there was no consideration in the present case, the doctrine of promissory estoppel is not applicable. The promises in this case were bargained for and accordingly the doctrine of promissory estoppel does not apply.

In *Gilmore v. Ute City Mortgage Company*, 660 F. Supp. 437 (D. Colorado 1986), the Court stated:

“Colorado has adopted the doctrine of promissory estoppel as stated in section 90 of the Restatement (Second) of Contracts. *Vigoda v. Denver Urban Renewal Authority*, 646 P.2d 900, 905 (Colo. 1982). This doctrine should be applied to prevent injustice *where there has not been mutual agreement by the parties on all essential terms of a contract*, but a promise was made which the promisor should reasonably have expected would induce action or forbearance, and the promise in fact induced such action or forbearance. *Id.* at 905 (emphasis added).

Promissory estoppel is therefore applicable only in the absence of an otherwise enforceable contract. See Calamari & Perillo, *The Law of Contracts*. §6-7 (2d ed. West 1977) (“[b]efore looking to the doctrine of promissory estoppel the courts ordinarily look to see if conventional consideration is present”).

In the case at bar, the parties have participated in a fully “bargained for” exchange of conventional consideration. The first sentence of the final paragraph of the construction financing commitment letter explicitly makes the letter “the full and

complete agreement between the borrower and lender.” Gilmore does not allege fraud, duress, or other illegality which would render the contract void or voidable. **Therefore the commitment letter is a valid, mutually enforceable agreement. The rights and duties of the parties must be determined by reference to specific contractual terms. The alternative remedy of promissory estoppel is never reached where, as here, “there has been mutual agreement by the parties on all essential terms of a contract.”** *Vigoda*, at 905. Defendants’ motion for summary judgment is therefore granted on the promissory estoppel claim.” (Emphasis added)

(See attached **Exhibit 6**)

The facts in *Gilmore* are very similar to the case at bar. The Court found as a matter of law that there was a contract governing the loan. Therefore, the alternative remedy of promissory estoppel should never have been reached.

In *LaSalle National Bank v. Metropolitan Life Insurance Company*, 18 F.3d 1371 (7th Cir. 1994), the Court stated:

“ . . . Count III of the Jafaris’ complaint fails because the doctrine of promissory estoppel, which “is a theory of law by which a person may be held liable for a promise, for which there is no consideration. . . has never been considered available when the parties have entered into a contract which is binding under contract law[,]” as is the case here. *Wagner Excello Foods, Inc., v Fearn International, Inc.*, 235 Ill. App. 3d 224, 226, 176 Ill. Dec. 258, 266, 601 N.E.2d 956, 964 (1992)”

(See attached **Exhibit 7**)

In *Wagner Excello Foods, Inc., v. Fearn International, Inc.*, 235 Ill. App. 3d 224, 601 N.E.2d 956 (1992), the Court stated:

“ . . . We have held, at the plaintiff’s urging, that count I was based on an unambiguous promise and was an enforceable contract at the time the parties entered into it. That being so, the question before us is whether a party may maintain a breach of contract action *and* a promissory estoppel claim based on the breach of the same promise. . . . The name, ‘Promissory Estoppel’ is modern, but the doctrine had existed in some jurisdictions for many years. It has not received much attention in Illinois, and we do not go into it further in this case, because *the doctrine has never been considered available when the parties have entered into a contract which is binding under contract law.* *Union Mutual Life Ins. Co. v. Mowry*, 96 U.S. 544, 24 L.Ed. 674.” (Emphasis added.)

(See attached **Exhibit 8**)

Here, as in *Wagner, supra*, the parties have entered into a valid contract and the promissory estoppel doctrine is not applicable.

In summary, Judge Warren was correct in his opinion granting the Flagstar Bank's Motion for Judgment Notwithstanding the Verdict when he ruled that the issue of promissory estoppel should not have been submitted to the jury because there was a binding contract which governed the dispute. All of the above authority supports Judge Warren's decision. The Court of Appeals' position that the matter should have been left to the jury to determine is incorrect under all of the above authority.

II. THE DECISION OF THE COURT OF APPEALS THAT PLAINTIFFS' PROMISSORY ESTOPPEL CLAIM, WHICH WAS BASED ON AN ORAL PROMISE, DID NOT VIOLATE THE STATUTE OF FRAUDS, WAS CLEARLY ERRONEOUS AND IN CONFLICT WITH A BINDING DECISION OF THE COURT OF APPEALS.

The Plaintiffs base their breach of contract claim on a conditional contract. (**Exhibit 1**) The conditional contract contains a number of conditions that would have to be satisfied before there would be an obligation for Flagstar to make a loan to the Plaintiffs.

However, the Court of Appeals ruled that the promise underlying the Plaintiffs' promissory estoppel claim was not the written conditional contractual promise contained in the trial court's Exhibit 35, but rather another oral promise made by Flagstar's representatives that was unconditional. (See Opinion attached **Exhibit 4**)

In its Opinion on page 4, the Court stated the following:

"We disagree with defendant's contention that the trial court's decision may be upheld because plaintiffs could not establish promissory estoppel for the reason that any promise made by it was conditional only. Although the evidence indicated that plaintiffs' loan application was conditionally approved, **the**

promise underlying plaintiffs' promissory estoppel theory was not conditional. Plaintiffs presented evidence that they were unconditionally assured that their property was eligible for financing, notwithstanding that it was in foreclosure, was a working farm, and consisted of more than fifty-three acres. **Plaintiffs relied on this promise** to their detriment by proceeding with the loan application process, obtaining an extension of the redemption period, and foregoing alternative sources of financing. . . .” (Emphasis added)

Under the above analysis it is clear that the Court of Appeals is stating that the Plaintiffs' promissory estoppel claim is based on a promise in which Plaintiffs were unconditionally assured that their property was eligible for financing notwithstanding that it was in foreclosure, was a working farm, and consisted of more than fifty-three acres. The promise referred to by the Court of Appeals was an **oral promise** allegedly made by Flagstar's loan officer, Paul O'Connell. (TR., Vol II, 43, 65, 90)

Since the Plaintiffs' promissory estoppel case is based on an oral promise, the promissory estoppel claim is barred under the Statute of Frauds.

The Statute of Frauds, MCL §566.132, reads in pertinent part as follows:

(2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution **unless the promise or commitment is in writing** and signed with an authorized signature by the financial institution:

(a) A **promise or commitment to lend money**, grant or extend credit, or make any other financial accommodation.

(b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.

(c) A promise or commitment to **waive a provision of a loan**, extension of credit, or other financial accommodation. (Emphasis added)

In the present case the Plaintiffs argued that bank officials made oral representations that their property was eligible for financing, notwithstanding that it was in foreclosure, was a working farm, and consisted of more than fifty-three acres. Under MCL §566.132(2)(c) this

promise to waive a provision of a loan commitment or to make a loan was invalid since it was not in writing.

The case of *Crown Technology v. D&N Bank, FSB*, 242 Mich App 538; 619 NW2d 66 (2000), is directly on point. In *Crown, supra*, the Court of Appeals held that MCL §566.132(2) bars an action for promissory estoppel in this type of case when it stated:

“MCL 566.132(2); MSA 26.922(2) expressly states that “[a]n action *shall not be brought against a financial institution* to enforce [a promise or commitment to waive a provision of a loan] unless the promise or commitment is in writing and signed with an authorized signature by the financial institution” (emphasis supplied). This language is unambiguous. It plainly states that a party is precluded from bringing a claim—no matter its label—against a financial institution to enforce the terms of an oral promise to waive a loan provision.

Crown Technology’s argument that MCL 566.132(2); MSA 26.922(2) does not eliminate promissory estoppel as a cause of action for an unfulfilled oral promise to waive a loan term is unpersuasive. The statute of frauds specifically bars “an action.” By not specifying what sort of “action” MCL 566.132(2); MSA 26.922(2) prohibits, we read this as an unqualified and broad ban. We also note that the subsections of MCL 566.132(2); MSA 26.922(2) use generic and encompassing terms to describe the types of promises or commitments that the statute of frauds now protects absolutely. **This is consistent with interpreting MCL 566.132(2); MSA 26.922(2) to preclude *all* actions for the enumerated promises and commitments, including actions for promissory estoppel.** Further, it would make absolutely no sense to conclude that the Legislature enacted a new section of the statute of frauds specifically addressing oral agreements by financial institutions but, nevertheless, the Legislature still intended to allow promissory estoppel to exist as a cause of action for those same oral agreements.” (Emphasis added)

In *Crown, supra*, the Court also stated:

“By bringing its promissory estoppel claim, Crown Technology asked the trial court to enforce D&N Bank’s alleged oral promise to waive the prepayment term in the promissory note. In clear and unambiguous language, MCL 566.132(2); MSA 26.922(2) specifically bars this type of action. The trial court should have summarily disposed of this claim because there was no relief available. MCR 2.116(C)(8) and (C)(10).”

Crown, supra is right on point. In *Crown* there was a written promissory note that expressly stated that there would be a penalty if that note was prepaid. The Plaintiff argued that

the bank had orally promised to waive the prepayment term in the promissory note and argued the doctrine of promissory estoppel. The court rejected the claim by stating that the oral promise to waive the written prepayment term in the document was unenforceable under the Statute of Frauds.

In the case at bar, Plaintiffs are arguing that a promise was made to them that they were eligible for financing, notwithstanding the fact that their property was in foreclosure, was a working farm, and consisted of more than fifty-three acres. Here, as in *Crown*, the Court should hold that the alleged oral promise to make a loan or waive conditions in the commitment letter is invalid and unenforceable under the Statute of Frauds, MCL §566.132(2).

As the Circuit Court stated in its Opinion:

“ . . . The factual circumstances presented in the case at bar are materially indistinguishable from the factual scenario present in *Crown Technology Park*, in which case the plaintiffs alleged that the defendant financial institution had waived a certain provision in a promissory note.”

The Court of Appeals attempts to circumvent the binding precedent of *Crown Technology, Inc.* by arguing that in the present case Flagstar’s promise was evidenced by a writing. However, with regard to the promise underlying Plaintiffs’ promissory estoppel theory, the Defendant’s promise **was not evidenced by a writing**. As noted above, the Court of Appeals described the promise underlying Plaintiffs’ promissory estoppel theory as follows:

“ . . . Although the evidence indicated that plaintiffs’ loan application was conditionally approved, the promise underlying plaintiffs’ promissory estoppel theory was not conditional. Plaintiffs presented evidence that they were unconditionally assured that **their property was eligible for financing, notwithstanding that it was in foreclosure, was a working farm, and consisted of more than fifty-three acres**. Plaintiffs relied on this promise . . . ”

The promise referred to above was not in writing. It was an oral promise allegedly made by Paul O’Connell during discussion with the Plaintiffs.

The conditional written contract contained in Exhibit 35 is not the basis of the Plaintiffs' promissory estoppel claim. This can be seen because the Court of Appeals indicated that the promise underlying Plaintiffs' promissory estoppel theory was not conditional. The promises contained in the written contract admitted as Exhibit 35 are conditional. Therefore, whether the signatures contained on Exhibit 35 meet the Statute of Frauds is irrelevant to the Plaintiffs' promissory estoppel claim, since the Plaintiffs' promissory estoppel claim is based on oral, not written promises.

Under MCL §566.132(2), the promise that forms the basis for the promissory estoppel claim must be in writing in order to be actionable. In this case, it is not; it is oral. Therefore, under the theory of *Crown Technology, supra*, the Plaintiffs' promissory estoppel claim is barred by the Statute of Frauds.

In its Opinion the Circuit Court stated:

“ . . . In fact, the evidence at trial, accepted by the jury, was that **(1) the Defendant financial institution made specific oral representations that the conditions of the Commitment Letter had either been met or were waived**, (2) the Plaintiffs relied on such representations, which resulted in the Plaintiffs failing to pursue alternative financing, (3) despite its representations, the Defendant failed to make (sic) fund the loan commitment, and (4) the Plaintiffs lost their home to another financial institution because of the Defendant's actions. . . ” (Emphasis added)

The Circuit Court also stated in its Opinion:

“ . . . Moreover, the Legislature's policy decision to preserve the integrity of written contracts and agreements in the financial services industry appears to be well-grounded – the case in bar is just one example of how financial institutions may be subjected to extensive litigation even when the terms of the agreement at issue clearly eschew any liability on the part of the institution.”

The Plaintiffs cannot take a written conditional contract and claim that the written contract, which is not the basis of their promissory estoppel claim, serves to satisfy the Statute of Frauds when the promise on which the promissory estoppel claim is based, i.e., “that the

Plaintiffs were unconditionally assured that their property was eligible for financing” was oral. In order to satisfy the Statute of Frauds in *Crown Technology, supra*, the promise on which the promissory estoppel claim was based would have to be in writing to be a valid claim.

MCR 7.302 (B)(5) states that an application for leave to appeal from a decision of the Court of Appeals must show the following:

“ . . . (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or. . . ”

As can be seen from the above analysis, the decision is clearly erroneous since the Statute of Frauds requires a writing to enforce a promise to loan money and the promise in the case at bar was oral.

In addition, the decision of the Court of Appeals in this case conflicts with *Crown Technology v. D&N Bank, FSB, supra*, which provides that pursuant to the Statute of Frauds, MCL §566.132 (2), the promise on which the promissory estoppel claim was based would have to be in writing to be a valid claim.

Furthermore, the Court of Appeals decision caused a material injustice to Flagstar Bank. Flagstar entered into a written binding contract with the Plaintiffs in this case. The Plaintiffs did not meet the conditions to obtain a loan. However, the Court of Appeals ruled that the Plaintiffs could rely on an oral promise of one of the bank’s loan officers and have their claim for promissory estoppel heard by the jury.

Therefore, Flagstar Bank was deprived of its right to contract. It was also deprived of its right to have the Court determine whether a valid contract had been demonstrated and whether the jury should determine whether there was a valid promissory estoppel claim. Flagstar Bank

was further deprived of its right to be protected under the Statute of Frauds from litigation based on oral promises.

Based on the above analysis, it is clear that the Court of Appeals decision was clearly erroneous and conflicted with another decision of the Court of Appeals. It is also clear that the decision caused material injustice to Flagstar Bank and accordingly, Flagstar respectfully requests that this Honorable Court grant leave to appeal pursuant to MCR 7.302 (B) (5).

III. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT OVERTURNED JUDGE WARREN'S RULING GRANTING FLAGSTAR'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE UNDER MICHIGAN LAW A PROMISSORY ESTOPPEL CLAIM CANNOT BE BASED ON A CONDITIONAL PROMISE, ESPECIALLY WHEN THE CONDITION DID NOT TAKE PLACE.

The promises contained in the contract in this case are conditional. (See contract attached hereto as **Exhibit 1**). In *First Security v. Aitken*, 226 Mich App 291; 573 NW2d 307 (1997), the Court of Appeals stated:

“Because the condition was never satisfied, FSB’s obligation to issue additional loans never arose and the Aitkens’ contention that FSB was obligated to do so is without merit. See *Bivans Corp v Community Nat’l Bank of Pontiac*, 15 Mich App 178, 182, 166 NW2d 270 (1968) (“**plaintiff cannot construct a detrimental reliance or estoppel theory on a conditional promise, especially when the condition did not take place**”).” (Emphasis added.)

Further, in *Bivans Corp. v. Community Nat’l Bank*, 15 Mich App 178; 166 NW2d 270 (1968), the Court of Appeals stated:

“**Thus, the precondition to payment never occurred and plaintiff cannot construct a detrimental reliance or estoppel theory on a conditional promise, especially when the condition did not take place.** Plaintiff cannot recover on either a contract or an estoppel theory and, therefore, the complaint did not state a claim on which relief could be granted.” (Emphasis added)

The above authority is clear that a promissory estoppel theory cannot be based on a conditional promise, such as to the promises that were involved in the present case, which were clearly conditional.

Both *First Security, supra* and *Bivans, supra* categorically state that a promissory estoppel theory cannot be constructed on a conditional promise, especially when the condition did not take place.

In the case before the Court, there were a number of conditions that were not met by the Appellants so the loan was never made.

However, under the above authority, even if the conditions had been met, the Appellants could not recover on a promissory estoppel theory since the promises were conditional. The above cases indicate that promissory estoppel cannot be based on a conditional promise, even if the conditions were met.

The Court of Appeals argues in its Opinion that the promise underlying the promissory estoppel claim is not the promise contained in the written contract but an oral promise from the loan officer that the Plaintiffs would be given a loan. The Court of Appeals argues that this promise is unconditional and therefore the above cited law would not apply.

The problem with the analysis set forth by the Court of Appeals is that the oral unconditional promise made by the loan officer is also barred by the Statute of Frauds, MCLA §566.132 (2). The Statute of Frauds provides that a promise or commitment to loan money or to waive loan requirements must be in writing in order to be enforceable. The oral promise made by the loan officer, which the Court of Appeals states underlies the Plaintiffs' promissory estoppel claim, is not in writing and therefore, the promissory estoppel claim should have been dismissed under MCLA §566.132.

Whether the promises underlying the Plaintiffs' promissory estoppel claim are written and conditional or oral and unconditional, the claim must be dismissed either under the above case law if written and conditional or under the Statute of Frauds if oral and unconditional. Under either analysis the Plaintiffs' promissory estoppel claim should be dismissed and the Court of Appeals erred by not dismissing it.

IV. THERE ARE A NUMBER OF ADDITIONAL REASONS THAT THE COURT OF APPEALS ERRED IN REVERSING JUDGE WARREN'S DECISION TO GRANT THE JUDGMENT NOTWITHSTANDING THE VERDICT.

One of the additional reasons that the Court of Appeals was in error in reversing Judge Warren's Judgment Notwithstanding the Verdict ruling is that the Plaintiffs did not meet a number of the conditions to be met by them for obtaining a loan as set forth in a letter dated March 24, 1999. (See attached **Exhibit 1**).

Two of the conditions that were not met in this case were that the property had to be less than ten acres and also that it could not be a working farm.

However, condition no. 4 reads as follows:

"Satisfactory appraisal by a Flagstar approved appraiser for at least \$275,000.00."

Tina Cowen testified that in order for the appraisal to be satisfactory, the property proposed as collateral had to meet Flagstar guidelines. Therefore, the appraisal had to be suitable not only in amount, but in the type of property proposed for the loan.

In this case the collateral did not qualify since the collateral was a working farm and it was larger than ten acres. As a result, the Plaintiffs failed to meet condition no. 4 since their appraisal was unsatisfactory.

Plaintiffs also have argued that all of the conditions were met. However, this is clearly not true because condition 4, the appraisal requirement, was not met since the collateral was a working farm and it was larger than ten acres.

In addition, conditions 5 and 6 were not met. Those conditions read as follows:

“(5) DOC. MTG CURRENT AT TIME OF APPLICATION; IF NOT, MUST
REDUCE PORT LEVEL TO PORT 4, LTV MAY
(6). . . BE LOWERED & CANNOT HAVE CASH OUT. (& CANNOT BE
MORE THAN 89 DAYS PAST DUE)”

All of the testimony at the trial was that conditions 5 and 6 were not met. The testimony was that the First National Bank of Howell Mortgage was not current at the time of application, but in fact was approximately three months delinquent. More importantly, the NBD mortgage was not current at the time of application and was also more than 89 days past due. The NBD mortgage had gone into foreclosure and was 10 months into the redemption period at the time that the loan was applied for. Therefore, the debt was obviously more than 89 days past due.

Paul O’Connell testified that conditions 5 and 6 were not met. Tina Cowen testified that conditions 5 and 6 were not met. More importantly, Plaintiff, James Gore testified on cross-examination that conditions 5 and 6 were not met.

It is hard to see how the Plaintiffs can argue that all of the conditions were met. For instance, condition no. 6 says:

“... (& CANNOT BE MORE THAN 89 DAYS PAST DUE).”

There is absolutely no dispute that both the First National Bank of Howell Mortgage and the NBD Mortgage were way beyond 89 days past due. Therefore, the condition is simply not met.

In summary, the loan did not even come close to meeting the conditions required for approval. All of the testimony at the trial confirmed that the conditions were not met, including the testimony of the Plaintiff, James Gore.

In addition, it appears clear that the Court of Appeals should have affirmed Judge Warren's grant of Defendant's Motion for Judgment Notwithstanding the Verdict in this case because the written contract contained in Exhibit 24/35 did not meet the writing requirements of the Statute of Frauds.

Another reason that the Judgment Notwithstanding the Verdict should have been upheld was that the verdict in this case was clearly and grossly excessive under Michigan law. Under the authority of *Craig v. Oakwood Hospital*, 249 Mich App 534; 643 NW2d 580 (2002), the verdict was excessive.

In addition, the Court of Appeals made another error by ruling that Flagstar's banking expert could not testify at the trial. Under the authority of *Rickwalt v. Richfield Lakes Corp.*, 246 Mich App 450 (2001), it is clear that the Court of Appeals should have ruled that Defendant's expert's testimony should have been admitted at the trial in this matter so that the jury could have the advantage of hearing his educated and expert opinions regarding the complex banking issues involved in the trial.

V. THE ISSUES IN THIS APPEAL INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE.

MCR 7.302 (B)(3) states that an Application for Leave to Appeal must show that:

“(3) the issue involves legal principles of major significance to the state's jurisprudence;”

The Court of Appeals decision in this case failed to follow binding precedent in the area of contract law, promissory estoppel, and the Statute of Frauds. MCL §566.132.

While the Court of Appeals decision was a major victory for the Plaintiffs' bar, it caused considerable damage to the legal jurisprudence of the State of Michigan in the above cited areas.

To begin with, the Court of Appeals held in this case that an oral promise to lend money was enforceable notwithstanding the express provisions of the Statute of Frauds, which requires a writing. The Court of Appeals' decision conflicts with *Crown Technology v. D&N Bank, FSB, supra*, which holds that for the purposes of the Promissory Estoppel Doctrine, a promise to loan money must be in writing in order to be enforceable.

The Court of Appeals also held that the question of whether there is a promissory estoppel claim should be decided by the jury and not by the Court. This ruling was in direct conflict with prior Michigan authority including *State Bank of Standish v. Curry, supra*.

The Court of Appeals also erroneously ruled that a promissory estoppel claim could be submitted to the jury even though the trial court found as a matter of law that a written contract governed the issues. This ruling is in conflict with a number of Michigan decisions.

As a result of the ruling of the Court of Appeals, the law in the areas of contract, promissory estoppel and the Statute of Frauds is in a state of tremendous confusion, if not chaos.

Under the Court of Appeals ruling a bank's right to enter into a loan agreement with a prospective customer has been thrown into a state of complete confusion. The Court of Appeals ruled that the bank's commitment contract is not controlling. Under the Court's ruling any bank customer could bring an action for promissory estoppel and have a jury determine whether the customer is entitled to damages. The conditions contained in the commitment letter could be ignored by the jury under the ruling of the Court of Appeals. As a result, the ruling of the Court of Appeals should open the gates for a new wave of promissory estoppel claims against banks based on the oral representations of loan officers.

The Court of Appeals also ruled that under the Statute of Frauds a loan officer's oral representations are actionable. Even though the Statute of Frauds clearly requires a writing to enforce a loan commitment, the Court of Appeals has ruled that such a writing is not necessary.

This will make it even more difficult for banks to enforce their loan commitments. It will also spur more lawsuits based on promissory estoppel and oral representations of bank employees.

These rulings will also be applicable in areas other than banking. Whenever an individual enters into a contract in any commercial setting, the individual can argue that oral representations were made by a company representative thereby obtaining a jury trial on a promissory estoppel claim. According to the Court of Appeals, under the promissory estoppel claim, any limitations or protections contained in the contract would be inadmissible and the Plaintiff would obtain a jury trial on the oral representations only.

As a result of the Court of Appeals ruling, in every contract case the Plaintiff will be given two bites of the apple. The first bite will be on the breach of contract claim. If the Plaintiff does not prevail there he or she can obtain a jury trial on the promissory estoppel claim.

Accordingly, the Court of Appeals ruling will result in an increase in trials and appeals. There will also be less incentive for Plaintiffs to settle their contract claims since under the Court of Appeals ruling they are now given two chances to prevail. Since it is not uncommon for a Plaintiff in a breach of contract case to add a claim of promissory estoppel, the increase in litigation could be significant.

In addition, the Court of Appeals has ignored the comments contained in the jury instructions for promissory estoppel. Those instructions clearly state that there should not be an instruction on promissory estoppel where a contract claim is at issue.

If the Court can ignore the comments to jury instructions for promissory estoppel, then presumably it can ignore the comments in all other areas as well. This will result in an increase in appeals on jury instruction issues.

Under the ruling of the Court of Appeals, contracts lose their reliability and enforceability. Businesses cannot be confident that their contracts will be enforced.

Another problem with the Court of Appeals decision is that these contracts, promissory estoppel and Statute of Frauds issues arise quite frequently. Typically when a Plaintiff files a breach of contract claim, a promissory estoppel claim is included as a count in the lawsuit. The Court of Appeals decision will have the effect of preventing settlements and forcing trials so that Plaintiffs can get their second bite of the apple under a promissory estoppel theory.

As pointed out above, the Court of Appeals decision has created a split of authority in the above described areas. Litigating all these promissory estoppel claims will be a tremendous waste of the Court's resources.

This case presents an excellent opportunity for the Supreme Court to clear up the confusion caused by the Court of Appeals Opinion. If the Supreme Court were to rule that under the Statute of Frauds a promise to loan money must be in writing, then the confusion in that area would be cleared up and the precedent of *Crown Technology v. D&N Bank, FSB, supra* would be followed.

If the Court were to rule that the Court, and not the jury, decides whether a promissory estoppel claim should go forward, then the confusion in the promissory estoppel area would be cleared up and binding precedent would be followed.

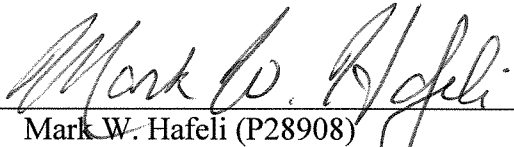
If the Supreme Court were to rule that where there is a contract entered into between the parties, there is no claim for promissory estoppel, then that area of the law would be cleared up and binding precedent would be followed.

For all of the above reasons, Flagstar Bank respectfully requests that this Honorable Court grant leave to appeal and affirm the decision of Judge Warren granting Flagstar's Motion for Judgment Notwithstanding the Verdict.

Respectfully submitted,

BEIER HOWLETT, P.C.

By:

A handwritten signature in dark ink, appearing to read "Mark W. Hafeli", written over a horizontal line.

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